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No. 91-529

Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

October Term, 1991

ABUNDANT LIFE CHRISTIAN CENTRE, INC.,

Petitioner,

-vs-

WILLIAM MARKHAM, as Broward County Property Appraiser,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner will be referred to as "Abundant Life" and Respondent as Mr. Markham or the Property Appraiser. References in this Brief to Petitioner's Petition for Writ of Certiorari will be "P-(page number)". References to the Appendix to the Petition will be "App. (page number)a". Respondent's Appendix commences numbering at page 74a. All references herein to "F.S." refer to the Florida Statutes (1989). References to the "Circuit Court" are to the Circuit Court of the Seventeenth Judicial Circuit of Florida, a state trial court of general jurisdiction. References to the "District Court" are to the District Court of Appeal of Florida, Fourth District, an intermediate Florida appellate Court.

In the Courts below, Mr. Markham timely objected to consideration of

Constitutional challenges to the statute of nonclaim for Abundant Life's failure to join an indispensable party and to serve the Attorney General of Florida or State Attorney of the Seventeenth Judicial Circuit as required by § 86.091, F.S. § 194.181(5), F.S., provides that the State Department of Revenue must be a party Defendant to an action challenging an assessment on Constitutional grounds.

The Broward County Property Appraiser is not the correct party to defend the constitutionality of a Florida statute; he is a ministerial officer. This task properly belongs to the Florida Attorney General both in the trial Court and in this Court. Since Abundant Life failed to give the Attorney General the opportunity to make a record in the trial Court concerning the constitutionality of § 194.171(2), Florida Statutes, this Court

should not entertain a challenge to the statute's alleged unconstitutionality.

Mr. Markham is not the public official who should be defending a challenge to the form of the tax bill that is both prepared and sent by another officer of local government, the Broward County Revenue Collector. The Florida Legislature has prescribed the language of the tax notice in § 197.3635, F.S. and has forbidden the Revenue Collector from using any other form. § 197.322(3), Florida Statutes. Had the Revenue Collector been made a party, he would doubtless have addressed Abundant Life's assertion that the tax notices could include a statement of the date the tax rolls were certified, "at no cost and no effort by the Property Appraiser". (P-23)

SUMMARY OF ARGUMENT

As to Question 1: Mr. Markham actually mailed Abundant Life a written notice of denial of its claim for tax exemption on June 1, 1989. (See copy at App. 80a, 86a) The notice specifically advised Abundant Life of its right to review of the denial before an independent administrative tribunal. Later in 1989, Mr. Markham sent a second notice to all property owners in Broward County, which advised all taxpayers of any exemptions applicable for the year 1989. This notice advises all taxpayers of their rights to an administrative assessment challenge. Abundant Life did nothing in response to either notice.

Mr. Markham first certified the 1989 tax rolls for collection on October 17, 1989. This commenced the running of the sixty day period of nonclaim within which

Abundant life must file suit to contest Mr. Markham's denial of exemption. Mr. Markham published notice of certification in a large classified display advertisement in two newspapers, and posted the date in his office. Florida law provides that Abundant Life could have written to Mr. Markham, asking to be advised in writing of the certification date. It did not. Late in October or early in November, 1989, the Broward County Revenue Collector mailed a tax bill to Abundant Life. This tax bill also disclosed that exemption for that year was "$0". (App. 17a) Abundant Life had at least forty-five days within which it could have filed suit after it received this tax bill. This is the notice that Abundant Life claims to be deficient because it does not notify it of the existence of the sixty day statute of

nonclaim and the date the rolls were certified.

This Court must look at the entire tax process, not simply the contents of the last notice sent (the tax bill), in determining whether Florida law provides adequate due process of law to one whose claim for exemption has been denied. There is "zero" risk of an erroneous deprivation of Abundant Life's property interests through the procedures employed. Abundant Life simply refused to take advantage of them. Florida law thus satisfies the notice requirements of the Fourteenth Amendment to the Constitution.

Since Abundant Life challenges the form of the tax bill sent out by the Broward County Revenue Collector, rather than the notices sent by Mr. Markham, that official and the State of Florida,

Department of Revenue should have been responsible for defending whether this notice and the tax scheme of which it is part are constitutional. Neither official was a party in the courts below.

As to Question 2: Since the December 29, 1989 telephone call between counsel for Abundant Life and the Property Appraiser is alleged to have occurred after the sixty day statute of nonclaim expired, Abundant Life had already lost its judicial remedy. Even if counsel for the Property Appraiser had stipulated, parties to an action cannot confer jurisdiction on a court that otherwise lacks jurisdiction.

STATEMENT OF THE FACTS

Throughout its Petition, Abundant Life states as fact matters which were only allegations of its Amended Complaint. For example, it claims that its land was "... real property utilized by Abundant Life solely for purposes exempt under Florida constitutional and statutory law from ad valorem taxation." (e.s., P-5). Again, it states as fact, "...thus rendering the courts impotent in addressing issues such as estoppel, fraud, or misrepresentation on behalf of the Property Appraiser's office, such as occurred in this case." (e.s., P-14). Some statements, e.g., the assertion at P-28 that the Property Appraiser might not respond to a letter asking for notice of the tax roll certification date because the Property Appraiser's office is busy with administrative tax hearings before

the Property Appraisal Adjustment Board, have no record support. Mr. Markham's Answer to the Amended Complaint denied all allegations save Paragraph 2, admitting his status as Broward County Property Appraiser, and the fact that he denied Petitioner's claim for tax exemption. (See App. 74a - 87a for the full text of Respondent's Answer and Defenses.)

Once the case was at issue, Mr. Markham moved for Summary Judgment based on Petitioner's failure to file suit within sixty days of the certification of the tax rolls on October 17, 1989. Mr. Markham attached the Affidavit of Larry Nightingale, Clerk of the Property Appraisal Adjustment Board, who verified that Abundant Life did not file a petition with that Board in 1989. Even taking the allegations of its Amended Complaint as true, the action was dead on December 17,

1989 - well before the alleged telephone call between counsel for Abundant Life and counsel for the Property Appraiser on December 29, 1989. (App. 13a) At that time, Mr. Markham could have done nothing to confer jurisdiction on the Circuit Court.

Abundant Life attacks only one provision of the Florida Statutes, the 60-day statute of nonclaim contained in § 194.171(2), F.S.[1] That statute is part of a much larger statutory scheme. The system provides for plain, speedy and efficient administrative and judicial review of the Property Appraiser's decisions. This system has a myriad of due process protections built in.

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[1]Abundant Life should doubtless have attacked § 197.3635, F.S., which prescribes the contents of the tax notice. § 197.322(3), F.S., proscribes the Revenue Collector from including any other language in the tax bill.

Abundant Life implies at P-5 and P-9a and actually states at P-21 that the first inkling it had that its property would be taxed for the year 1989 was an October or November, 1989 tax bill, copy reproduced at App. 17a. The tax notice is actually the very last step in the annual Florida tax assessment and collection cycle. Abundant Life has not informed this Court that before the tax bill was sent, the Property Appraiser sent it two previous official written notices concerning denial of its application for exempt status.

Especially after Mr. Markham notified Abundant Life that its application for 1989 exemption was denied, it was charged with notice of the procedures contained in Florida's tax statutes, including the time

limitations contained therein.[2]

§ 196.011, F.S., requires Abundant Life to file for tax exemption for its property prior to March 1 of each year. The Property Appraiser examines the application, and if it is his intention to deny it, notifies the applicant on or before July 1 of the year. § 196.193(5), F.S. This section requires that the notice specify the denied applicant's right to appeal the denial to the Property Appraisal Adjustment Board ("P.A.A.B." herein), an administrative agency

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[2] *Ross v. Martin*, 800 F.2d 808 (8th Cir. 1986), cited at P-19, supports Mr. Markham's position. The Eighth Circuit held that due process of law was provided a taxpayer who was simply notified of his right to an administrative appeal without an encyclopedic explanation of the panoply of procedures available under Arkansas law. In Florida, as in Arkansas, once Mr. Markham notifies a taxpayer of the availability of an administrative remedy, due process of law is satisfied. *Id.* @ 812.

established by § 194.015, F.S. § 194.011(3)(d), F.S. provides that an applicant for exemption has thirty days from the Property Appraiser's denial in which to file a petition for administrative review of that denial to the P.A.A.B. That Board was authorized to grant Abundant Life complete relief and tax exemption for its property. Mr. Markham's Notice of Denial, reproduced at App. 86a, specifically advised Abundant Life of its right to appeal Mr. Markham's decision to the P.A.A.B. within thirty days of June 1, 1989, and even told it where to pick up the forms. Abundant Life apparently made a conscious decision not to pursue its administrative remedies. The P.A.A.B. administrative procedure accords a quasi-judicial, adversarial hearing and complete due process of law to one whose application for tax exemption

has been denied. § 194.034, F.S.. The Board is required to render a written decision containing specific findings of fact and conclusions of law. § 194.034(2), F.S.. This administrative remedy alone provides complete due process of law to Abundant Life, even if Florida's statutes did not provide a judicial remedy.[3]

The next protection Florida law accords a taxpayer is the "Truth in Millage" (TRIM) Notice. § 194.011(1), F.S. requires the Property Appraiser annually to send a TRIM Notice by first-class mail to each owner of real and personal property in the County. The form of this notice is prescribed by § 200.069(8), F.S.. The form specifically

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[3] *Hagar v. Reclamation Dist. No. 108*, 111 U.S. 701, 4 S.Ct. 663, 28 L.Ed. 569 (1884)

notifies the taxpayer of any exemptions that have (or, as in this case, have not) been applied to its property, informs the taxpayer of the amount of taxes it paid in the previous year, and advises of the dollar amount of the present year's proposed taxes. By Mr. Markham's notifying Abundant Life that its assessed value was $2,638,410 and exemptions were "$0", it was given a second notice in writing that it had not been granted tax exemption, and was specifically advised of its administrative remedies. Nothing in our Record implies that Mr. Markham failed to carry out his responsibilities under the TRIM Law.

§ 194.011(3)(d), F.S., provides that a taxpayer has twenty-five days from this second notice to file a petition to review the assessment with the P.A.A.B. The same procedures apply as with the earlier round

of hearings. Once again, Abundant Life failed to avail itself of its plain, speedy and efficient administrative remedy provided by the Florida Statutes.

Florida law requires Mr. Markham to certify the rolls for collection to the County Revenue Collector twice each year. The "first certification" is made under § 193.122(2), F.S. (68a) and includes all parcels except those which were still before the P.A.A.B. as of the certification date. The "second certification" is made under § 193.122(3) after the P.A.A.B. has completed its hearings for the properties subject to hearings whose petitions had not been decided as of the date of the "first certification". Only the "first certification" triggers the sixty day statute of nonclaim in § 194.171(2), F.S.; those taxpayers whose petitions were still

before the P.A.A.B. have sixty days from the date of the decision of the Board in which to file a complaint in Circuit Court. (§ 194.171(2), F.S., App. 70a)

Mr. Markham executed the "first certificate" to the Broward County Revenue Collector on October 17, 1989. (App. 85a) This is the date on which Abundant Life's 60-day statute of nonclaim began to run. The P.A.A.B. completed its hearings, and Mr. Markham made the "second certification" on January 31, 1990. (App. 92a) Abundant Life urged the Circuit and District Courts to judicially re-write the nonclaim statute and to find that the "second certification" commenced the nonclaim period.[4]

Mr. Markham published a notice in two

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[4]No Florida court has ever held that the "second certification" under § 193.122(3), F.S., starts the 60-day statute of nonclaim period.

newspapers of general circulation in Broward County - the Miami *Herald* (Broward Edition) and the Fort Lauderdale *News & Sun-Sentinel*, advising taxpayers of the fact and date of this certification. This is a display advertisement rather than fine print buried in the legal notices. (See App. 87a for copies of these notices.)

Since the certification date will vary from year to year, § 192.122(2), F.S., (App. 69a) provides that taxpayers who do not read the newspapers or visit Mr. Markham's office may be individually advised in writing of the date of the "first certification" by making a written request to the Property Appraiser. § 192.122(3), F.S., contains no such language as to the "second certification". (App. 69-70a) This is not surprising, since the "second certification" does not

commence operation of the statute of nonclaim. Abundant Life made no request to Mr. Markham under § 193.122(2), F.S. Abundant Life implies that it made such a request when it states at P-7:

> In April, 1990, Abundant Life requested that the Property Appraiser provide the dates of certification, which by statute is available to anyone who submits a written request, Fla.Stat. sec. 193.122(2), but the Property Appraiser refused to supply the date of second certification until ordered to do so by the Circuit Court.

The truth is that by April, 1990, Abundant Life had commenced its action in the Circuit Court. It argued in that Court that the Property Appraiser's second certification, made on January 21, 1990 under § 193.122(3), F.S., commenced the running of the statute of nonclaim. Abundant Life propounded Interrogatories to Mr. Markham as to the date of the "second certification". Mr. Markham

objected on grounds that this information was not evidence nor likely to lead to the discovery of admissible evidence, since the "second certification" does not trigger the running of the statute of nonclaim. (App. 88a-89a) The trial Court ordered Mr. Markham to respond (App. 90a) and he did. (App. 92a) None of this took place before Abundant Life's sixty day nonclaim period had expired.

Abundant Life was actually notified a third time that its property was going to be taxed for 1989, in plenty of time to file a lawsuit to contest the denial of its exemption. The final notice the taxpayer receives in a normal tax year cycle is the tax bill referred to at P-5. This is sent by another County official, the Revenue Collector, within 20 days of the Property Appraiser's "first

certification".[5] Again, Abundant Life sat on its rights and did nothing.

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[5] § 197.322(3), Florida Statutes (1989).

ARGUMENT - POINT 1

Petitioner's first claim is that it received inadequate notice of the sixty day period within which could file a timely complaint to judicially contest Mr. Markham's denial of its property tax exemption. (P-17) It argues that the taxpayer must be sufficiently notified in the tax bill itself to alert it to substantial adverse consequences in the event of inaction, and that the tax bill does not contain any such notice.

Petitioner plays fast and loose with this Court when it states at P-19, "The only 'notice' given regarding the final assessed ad valorem real property tax is the tax notice itself".

This Court held in *Mathews v. Eldridge*, 424 U.S. 47, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) that "due process" is not a technical conception with a fixed

content, unlike some legal rules, and established a four part analytical scheme to determine whether a particular procedure satisfies due process. These factors are (1) The private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, (3) the probable value, if any, of additional or substitute safeguards, and (4) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id.* @ 335, 96 S.Ct. @ 903, 47 L.Ed. @ 33.

First, Abundant Life assumes that a tax exemption in Florida is a property right subject to protection by the Fourteenth Amendment. Mr. Markham questions whether a taxpayer has the

"right" to a tax exemption, and doubts that such is a protected property interest. Under Florida law, all property is presumed to be taxable and claims for exemption are construed strictly against the applicant. *Adams Construction Equipment Corp. v. Hausman*, 472 So.2d 467 (Fla. 5th DCA 1985), *Volusia County v. Daytona Beach Racing & Recreation Facilities District*, 341 So.2d 498 (Fla. 1976)

However, assuming for the sake of argument only that Abundant Life has a Constitutionally protected property interest, Florida has established procedures that negate the risk of an erroneous deprivation of such interest through the procedures used. The fundamental requisite of due process of law is the opportunity to be heard; furthermore, the right to be heard has

little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest, so that an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Greene v. Lindsey*, 456 U.S. 444, 102 S.Ct. 1874, 72 L.Ed.2d 249 (1982)

Once Mr. Markham actually notified Abundant Life of his intention to deny its claim for tax exemption and notified it of its administrative rights, Abundant Life had received sufficient personal notification to satisfy the second test in *Mathews, supra*, and this Court's holdings

in *Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed.2d 865 (1950), *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1982) and *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988).

This Court's decision in *Mullane v. Central Hanover Bank & Trust Co., op.cit.*, requires interested parties to be apprised only of the pendency of an action and to be afforded an opportunity to present their objections. *Id.* @ 314. Mr. Markham has satisfied this by sending a written notice to Abundant Life that its 1989 exemption application had been denied, coupled with information concerning the administrative remedies it could follow.

As an applicant for exemption, Abundant Life was charged with knowledge

of the ad valorem tax statutes pertaining to denied exemptions. It was actually advised of its rights to administrative redress. Once Mr. Markham did this, Abundant Life was charged with notice of all the Florida laws pertaining to administrative and judicial review of its exemption denial *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 45 S.Ct. 491, 69 L.Ed. 953 (1925).

Abundant Life would have this Court ignore the fact that in addition to the Property Appraiser's posting the date of tax roll certification in his office, and publication of a large advertisement with that date, Florida law offers the taxpayer the right to receive actual written notice of the date the sixty day non claim period begins to run. Abundant Life could have, but did not avail itself of this provision of law.

Tulsa Professional Collection Services, Inc. v. Pope, op.cit., does not govern this case, since Florida law requires the Property Appraiser to send an individual notice of denial of exemption to a claimant for exemption. It would apply if, for example, Florida law only required the Property Appraiser to publish notice of exemption denial. A decedent's creditor might well not know of his or her debtor's death, but an applicant for tax exemption is charged with the laws once the Property Appraiser has communicated notice of denial to it.

Abundant Life suggests that each of the hundreds of thousands of taxpayers in Broward County - many of whom are probably not sufficiently unhappy with their assessments to file a civil action - be sent personal notice of the "first certification". Because Abundant Life

failed to join the Revenue Collector and Department of Revenue in the trial Court, no record was developed there as to the probable value, if any, of additional or substitute safeguards, nor was any evidence of a cost-benefit ratio adduced by Abundant Life. There are no free notices. Abundant Life does not suggest who should bear the additional cost of this notification of hundreds of thousands of Broward County property owners, and to balance the benefit against the cost. Presumably, everyone whose application for exemption was denied and who is sufficiently irritated to file a lawsuit will read the statutes and alert themselves to the date of roll certification by reading the writing on the wall of the Property Appraiser's office, obtaining the information from the newspaper advertisements, or asking for

individual notice of this fact.

Abundant Life has not satisfied the fourth test in *Mathews v. Eldridge*, supra. It has not demonstrated that its interests outweigh the State of Florida's interest that assessment contest actions be promptly filed. *Tulsa* @ 489, *Mennonite* @ 798-799.

Interestingly enough, none of those cases explicitly require the notice to state the time within which the affected party must take action, but only to advise such party that its rights may be affected by a pending proceeding, and that it may wish to do something to protect them.

Abundant Life cites *Emley v. Indiana Department of State Revenue*, 536 N.E.2d 558 (Ind. Ct.App. 1989) at P-19, 20 for the proposition that a notice is inadequate if it does not sufficiently alert the taxpayer to substantial adverse

consequences in the event of inaction. The case holds precisely to the contrary. It first observed that *Mullane, op.cit.* requires an interested party to be notified of proceedings and be accorded an opportunity to object. The Indiana court rejected Emley's argument that the notice was defective because it did not advise him of the ultimate consequences of his failure to respond. "Notice of the pendency of proceedings to collect the taxes and an opportunity to be heard before obtaining the lien is sufficient." *Id.* @ 562.

Burris v. Sewer Improvement District No. 147, 743 F.Supp. 655 (D.C. Ark. 1990), cited at P-19, supports Florida's tax scheme. There, the property owners were simply notified by mail of the plan to form a sewer district. The notice referred the owners to the existence of

laws governing the formation and operation of the district. Notice of the annual assessment thereafter was made only by publication. This was held to be sufficient notice as against claims that notice of the annual assessment was insufficient. The District Court observed in a footnote at page 660 that the assessment process was not an isolated proceeding for which the District was required to give a direct notice by mail. The establishment, organization and assessment of Sewer Improvement District 147 was held to be one proceeding for which direct notice, in addition to publication notices, was given. In our case, one cannot view the tax bill in a vacuum; it is the culmination of one proceeding, the annual ad valorem tax cycle.

The argument at P-24 that Abundant

Life did not know whether it has an objection until the publication of the notice of certification of the tax rolls is difficult to understand, given the two previous notices Mr. Markham had sent to it that its exemption was denied.

The hypothetical situation raised at P-25 and 26 where a delay in mailing out the tax bills might work to the detriment of a taxpayer is not present in our case. Abundant Life had the third notice that it was going to be taxed in ample time to file a timely lawsuit to contest the denial of exemption. Likewise, since Abundant Life never asked Mr. Markham to be supplied with the date of certification, hypothetical delays in his response do not apply to this case.

This Court has frequently held that when a State legislature, acting within the scope of its authority, undertakes to

exert the taxing power, every presumption in favor of the validity of the action is indulged. Only clear and demonstrated usurpation of power will authorize judicial interference with legislative action. *Walters v. City of St. Louis*, 347 U.S. 231, 74 S.Ct. 505, 98 L.Ed. 660 (1954) The burden on one attacking the legislative enactment is to negate every conceivable basis which might support it. *Madden v. Kentucky*, 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590 (1940).

The Florida Legislature has enacted a sixty day statute of nonclaim to ensure that local governments have timely knowledge of lawsuits that might adversely affect their ad valorem tax revenues for that year. If actions were allowed to be filed months or even years later, such lawsuits would wreak havoc on the public purposes for which tax revenues had been

budgeted. This Court has specifically held that where taxation is concerned and no specific federal right apart from Fourteenth Amendment guarantees is imperiled, states have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation. *Kahn v. Shevin*, 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974).

This Court has frequently held that a State must provide procedural safeguards against unlawful tax exactions in order to satisfy the commands of the Due Process Clause. See, e.g., *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Department of Business Regulation of Florida*, 495 U.S. ____, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990). The denial of tax exemption does not create an unlawful tax. Florida has provided procedural safeguards

which satisfy the Fourteenth Amendment.

Abundant Life's real problem is not with the Property Appraiser nor with the Florida Statutes, but with its representatives who failed to take timely action to take administrative or judicial action when it had been notified of the availability of that action.

DISCUSSION - POINT II

At P-30, Abundant Life argues that in the December 29, 1989 telephone conversation alleged to have taken place between its counsel and counsel for the Property Appraiser, the Property Appraiser's counsel should have advised it of the time in which to respond, thereby denying it due process of law. Abundant Life's Amended Complaint alleged that this conversation took place on December 29, 1990. (App. 13a)[6] By December 29, 1989, Abundant Life had lost its rights to an action under § 194.171, F.S. It is horn book law that even if the parties agree, they cannot confer jurisdiction on a court that otherwise has no jurisdiction.

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[6]The December 29, 1990 date in the Amended Complaint, served on June 1, 1990, is doubtless a typographical error; the correct date could only have been December 29, 1989.

Insurance Company of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982)

The Florida Rules of Judicial Administration, Rule 2.060(g), provides:

> No private agreements or consent between parties or their attorneys concerning the practice or procedure in an action shall be of any force unless the evidence of it is in writing, subscribed by the party or his attorney against whom it is alleged.

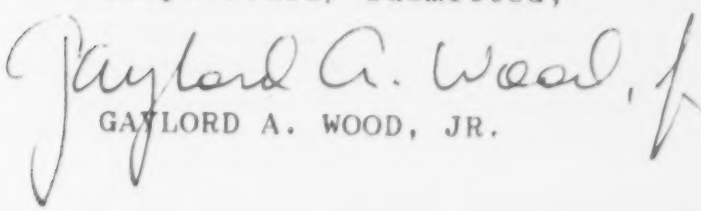
The type of agreement which Abundant Life alleged to exist, and which Mr. Markham denied existed, is thus specifically contrary to Rules promulgated by the Florida Supreme Court.

CONCLUSION

The Florida Legislature has provided for an applicant for tax exemption to receive three written notices from the Property Appraiser and Revenue Collector. In addition, the Property Appraiser also publishes notices of the date he certified the tax rolls for collection in two newspapers. He posts the same notice in the Property Appraiser's office. Any taxpayer who makes a written request of the Property Appraiser will be specifically advised in writing of the date of tax roll certification. This process abundantly provides for due process of law to an aggrieved taxpayer. The denial of a tax exemption in Florida presents taxpayers with opportunities for administrative and judicial challenges of the Property Appraiser's decision. The Florida Legislature's ad valorem tax

procedures minimize the risk of an erroneous deprivation of a taxpayer's property interest. This Court should deny the petition for writ of certiorari.

Respectfully submitted,



GAYLORD A. WOOD, JR.

No. 91-529

SUPREME COURT OF THE UNITED STATES

October Term, 1991

ABUNDANT LIFE CHRISTIAN CENTRE, INC.,

Petitioner,

-vs-

WILLIAM MARKHAM, as Broward County Property Appraiser,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

APPENDIX TO RESPONDENT'S BRIEF IN OPPOSITION

GAYLORD A. WOOD, JR.
Counsel for Respondent
304 S.W. 12th. Street
Fort Lauderdale, FL 33315
(305) 463-4040

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR BROWARD COUNTY CIVIL DIVISION

CASE NO. 90-09869 18

ABUNDANT LIFE CHRISTIAN CENTRE INC.,
Plaintiff ,

-vs-

WILLIAM MARKHAM, as Broward County Property Appraiser,

Defendant.

ANSWER AND DEFENSES OF DEFENDANT MARKHAM TO AMENDED COMPLAINT

Defendant, WILLIAM MARKHAM, as Broward County Property Appraiser, answers the Amended Complaint filed herein and say as follows:

1. Paragraphs 2 and the fact that the Property Appraiser denied exemption for the subject property as alleged in Paragraph 8, are admitted.

2. All the rest and remainder of the Amended Complaint not specifically admitted is denied.

WHEREFORE, having fully answered, Defendant MARKHAM prays that the Amended Complaint be dismissed, at Plaintiff's cost.

DEFENSES

As permitted by Rule 1.140(b), Fla.R.C.P., Defendant exercises the option to raise the following defenses in the Answer rather than by Motion to Dismiss:

3. *Lack of Jurisdiction over the Subject Matter.*

A. Plaintiff did not file a petition to the 1989 Property Appraisal Adjustment Board to contest the Property Appraiser's denial of exemption.

B. The Revenue Collector of Broward County requested that Broward County follow the "two certification" process provided for in Section 197.323, Florida Statutes, and the County Commission approved this recommendation.

C. Defendant Markham certified the 1989 tax rolls under Section 193.122(2),

Florida Statutes, on October 18, 1989. A true and correct copy of the Certificate to Roll is attached hereto as Exhibit "A" and incorporated by reference herein.

C. [sic] Since Plaintiff did not petition the Property Appraisal Adjustment Board for relief, no petition relating to the subject property was pending as of the date of this certification.

D. The "second certification" after the Property Appraisal Adjustment Board has completed its hearings is made according to Section 193.122(3), Florida Statutes, not Section 193.122(2). This "second certification" only reflects changes made by the Property Appraisal Adjustment Board and the Property Appraiser. Defendant Markham made no changes to the assessment of the subject property.

E. Section 194.171(2), Florida Statutes, requires that actions to contest assessments be filed within sixty (60) days

of certification of the tax rolls for collection ("First Certification") under Section 193.122(2), Florida Statutes. Said time expired December 18, 1989, and the Complaint in this action was not filed within said time limit. Accordingly, contrary to the allegations of Paragraph 7 of the Complaint, the action was not timely filed and a condition precedent to maintenance of this action has not been fulfilled.

F. Sec. 194.171(6), F.S., provides that the statute is a jurisdictional statute of nonclaim. This Court lacks subject-matter jurisdiction. *Markham v. Neptune Hollywood Beach Club*, 527 So.2d 814 (Fla. 1988), *Dade Drydock Corp. v. Broward County*, 250 So.2d 286 (Fla. 4th DCA 1971).

4. *Failure to join an indispensable party Defendant.* Plaintiff alleges that the assessment is contrary to the Florida Constitution in Paragraphs 10, 21 et seq. As provided in Section 194.181, Florida

Statutes, the official of state government responsible for overall supervision of the assessment and collection of taxes is an indispensable party.

5. The Amended Complaint fails to allege ultimate facts showing that the assessment is "void", as alleged in Count I. A tax assessment is "void" under three and only three very limited circumstances:

A. The assessment is not authorized by law.

B. The property is not subject to tax.

C. The taxing official has engaged in affirmative wrongdoing.

See *Dade County v. TAN Airlines*, 298 So.2d 570 (Fla. 3d.DCA 1974), cert.den. 305 So.2d 206 (Fla. 1974), holding a denial of exemption not to make an assessment "void".

6. Count II fails to state a cause of action by alleging that the Property Appraiser failed to consider the criteria found in Section 196.196, Florida Statutes.

Bystrom v. Whitman, 488 So.2d 520 (Fla. 1986) holds:

> We begin our analysis by noting the general proposition that the core issue in any action challenging a tax assessment is the amount of the assessment, not the methodology utilized in arriving at the valuation. *Homer v. Connecticut General Life Insurance Co.*, 213 So.2d 490 (Fla. 3d DCA 1968) An appraiser may reach a correct result for the wrong reason. *City National Bank v. Blake*, 257 So.2d 264 (Fla. 3d DCA 1972). Indeed, a taxpayer must carry a heavy burden in order to successfully challenge a tax assessment. A tax assessment carries a strong presumption of validity and, in order to prevail, the taxpayer must present proof that excludes every hypothesis of a legal assessment. *Blake v. Xerox Corp.*, 447 So.2d 1348 (Fla. 1984); *Straughn v. Tuck*, 354 So.2d 368 (Fla. 1977); *Powell v. Kelly*, 223 So.2d 305 (Fla. 1969).

7. Count III fails to state a cause of action. The public policy of the State of Florida is that all property is presumed to be taxable. Section 196.001, Florida Statutes. Grants of exemption are to be

construed strictly against the party applying for the same, and in favor of taxability of the property. *Adams Construction Equipment Corp. v. Hausman*, 472 So.2d 467 (Fla. 5th DCA 1985); *Daytona Beach Racing & Recreation District v. County of Volusia*, 372 So.2d 417 (Fla. 1979). Unless property clearly meets the strict ownership and use requirements of Chapter 196, Florida Statutes, it is not entitled to exemption.

8. Count IV fails to state a cause of action.

A. Defendant Markham sent Plaintiff a Notice of Denial of Exemption on June 1, 1989, a copy of which is attached hereto as Exhibit "B" and incorporated by reference herein. Said Notice informed Plaintiff that it had the right to contest the decision to the Property Appraisal Adjustment Board within thirty (30) days of the notice. Plaintiff failed to file such a petition.

B. Defendant Markham certified the 1989

tax rolls for collection on October 18, 1989. Notice of that fact was published in a newspaper of general circulation, the Fort Lauderdale Sun Sentinel, on or about October 19, 1989, as provided in Section 193.122(2), Florida Statutes, and a copy of the notice was posted in the Property Appraiser's office as provided in said statute. This statute provides that Plaintiff could have requested written notification of said date under this statute, but did not do so.

C. Defendant Markham sent a "Notice of Proposed Taxes" (TRIM) notice in August, 1989, showing the subject property to be taxable. Said notice was mailed according to Section 194.011, Florida Statutes. The notice advised Plaintiff that if it desired, it had twenty-five days to file a petition to contest the assessed value of the subject property.

D. All of the foregoing provides satisfactory protection to a plaintiff in an

ad valorem tax challenge. The vital interests of the taxing bodies of Broward County mandate a short statute of nonclaim so that suits cannot be filed months or years later which would adversely affect the public purposes for which tax revenues have been budgeted.

E. Plaintiff is charged with knowledge of the foregoing statutes, and has not pled sufficient facts to excuse compliance with the jurisdictional statute of nonclaim.

F. Plaintiff has not complied with the mandatory requirements of law relative to attempt to declare a statute to be unconstitutional.

9. Count V fails to state a cause of action for mandamus. As shown by Exhibit "B" attached, the Property Appraiser exercised the discretion vested in him by Chapter 196, Florida Statutes, and denied a tax exemption to the vacant land owned by Plaintiff. It is not a ministerial matter for which mandamus

is an appropriate remedy, to indirectly challenge the denial of a tax exemption.

10. Count VI fails to state a cause of action. Rule 2.060(g), Florida Rules of Judicial Administration, precludes any oral agreements between counsel unless made in open court. Plaintiff does not allege that a settlement agreement was made which can be enforced. Plaintiff has failed to allege all of the necessary elements of a contract, such as consideration, etc.

10. Count VII fails to state a cause of action. Estoppel does not lie against the State and its Constitutional officers such as the Property Appraiser. Plaintiff must allege (a) a representation as to a material fact that is contrary to a later-asserted position; (b) reliance on that representation and (c) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon. Plaintiff has failed to do so. See, *State*,

Department of Revenue v. Anderson, 403 So.2d 397 (Fla. 1981).

I HEREBY CERTIFY that a copy of the foregoing Answer to Amended Complaint and Defenses was served by mail this 8th. day of June, 1990, on E. SCOTT GOLDEN, ESQ., and LAW OFFICES OF PERRY W. HODGES, JR., Attorneys for Plaintiff, 644 S.E. 4th. Avenue, Fort Lauderdale, Florida 33301.

Law Offices Of
GAYLORD A. WOOD, JR.
FBN 087693
304 S.W. 12th. Street
Fort Lauderdale, Florida 33315-1521
Telephone 463-4040
Fax: 764-5734

By:__/s/ Gaylord A. Wood, Jr.____
Attorney for Defendant MARKHAM

DR-408
Rev. 7/77

CERTIFICATE TO ROLL

1989 Tax Roll

I, the undersigned, hereby certify that I am the duly qualified and acting Property Appraiser in and for Broward County, Florida; as such I have satisifed myself that all property included or includable on the Real (real, tangible personal) Property Assessment Roll for the aforesaid county is properly taxed so far as I have been able to ascertain; except as to parcels still before the Property Appraisal Adjustment Board that the said roll was certified and delivered to me by the Property Appraisal Adjustment Board on the 17th day of October, 19 89 ; and that all required extensions on the above described roll to show the tax attributable to all taxable property included therein have been made pursuant to law.

I further certify that upon completion of this certificate and the attachment of same to the herein described Assessment Roll as a part thereof, that said Assessment Roll will be delivered to the Tax Collector of this county.

In witness whereof, I have subscribed this certificate and caused the same to be attached to and made a part of the above described Assessment Roll this the 18th day of October, 19 89.

Property Appraiser of Broward

County, Florida

RECEIVED OCT 1 8 1989

WILLIAM MARKHAM
BROWARD COUNTY PROPERTY APPRAISER

Broward County Governmental Center
Room 111, 115 S. Andrews Avenue
Fort Lauderdale, Florida 33301-1886
Telephone: 357-6830

June 1, 1989

Abundant Life Christian Center, Inc.
1500 North State Rd 7
Margate, Florida 33063

With regard to your application for tax exemption on the subject property, we wish to advise that it has been acted upon as follows:

Totally Allowed _____

Partially Allowed _____

Denied 8230-17-020-Vacant Land

REMARKS: _____

_____

If you feel you are eligible for the amount denied, please contact our office at once to discuss this matter.

Please be advised that you have a right to APPEAL this decision to the Property Appraisal Adjustment Board. You have THIRTY (30) DAYS from the date of this notice to file a petition to said Board relating to this denial. Petitions for this purpose are available at our Main Office.

If you acquire by purchase, gift or lease, of if you dispose of by sale or rental any properties during the year, please notify this office.

This exemption is for 1989 only, and all future requests for renewals for exemption are required to be filed between January 1 and March 1 of each year.

Very truly yours,

Gail McConaghey

Gail McConaghey
Exemption Director

RECEIVED APR - 5 89

EXHIBIT B

For Fort Lauderdale News & Sun-Sentinel—As soon as possible

NOTICE OF CERTIFICATION OF TAX ROLL

Pursuant to Section 193.122, Florida Statutes, William Markham, Property Appraiser of Broward County, hereby gives notice that the Tax Roll for 1989, except as to parcels which are still before the Property Appraisal Adjustment Board, was certified to the Revenue Collector on the 18th day of October, 1989 for the collection of taxes.

William Markham, C.F.A., *Broward County Property Appraiser*

Miami Herald—Broward Edition—As soon as possible

NOTICE OF CERTIFICATION OF TAX ROLL

Pursuant to Section 193.122, Florida Statutes, William Markham, Property Appraiser of Broward County, hereby gives notice that the Tax Roll for 1989, except as to parcels which are still before the Property Appraisal Adjustment Board, was certified to the Revenue Collector on the 18th day of October, 1989 for the collection of taxes.

William Markham, C.F.A., *Broward County Property Appraiser*

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR BROWARD COUNTY CIVIL DIVISION

CASE NO. 90-09869 18

ABUNDANT LIFE CHRISTIAN CENTRE INC.,
Plaintiff ,

-vs-

WILLIAM MARKHAM, as Broward County Property Appraiser,

Defendant.

DEFENDANT MARKHAM'S NOTICE OF SERVICE OF ANSWERS TO PLAINTIFF'S FIRST INTERROGATORIES

Defendant, WILLIAM MARKHAM, as Broward County Property Appraiser, pursuant to Rule 1.140, Fla.R.C.P., hereby gives notice that Answers were served this date to the Interrogatories served on Defendant on April 26, 1990.

(Certificate of Service and Definitions omitted)

1. What is or was the date of first certification of the 1989 tax rolls for collection, and the date of second

certification of the 1989 tax rolls for collection:

Answer: First certification, October 18, 1989. As to second certification: Objection; not evidence nor likely to lead to admissible evidence since the second certification does not have any relevance to the commencement of the statute of nonclaim. See, Sec. 194.272(2) and 193.122(3), F.S.

(Interrogatories 2, 3, 4 and attest omitted)

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR BROWARD COUNTY CIVIL DIVISION

CASE NO. 90-09869 18

ABUNDANT LIFE CHRISTIAN CENTRE INC.,
Plaintiff ,

-vs-

WILLIAM MARKHAM, as Broward County Property Appraiser,

Defendant.

ORDER

THIS COURT having come on to be heard [sic], and the Court having heard argument of counsel and being otherwise advised in the premises, it is hereupon ORDERED and ADJUDGED that Plaintiffs' [sic] Motion to Compel Answer to Interrogatory No. 1 of Plaintiff's First Set of Interrogatories by [sic] and the same hereby is granted - 5 days. DONE and ORDERED in Chambers at Fort Lauderdale, Broward County, Florida this 21 day of

June, 1990.

W. Herbert Moriarty, Circuit Judge

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR BROWARD COUNTY CIVIL DIVISION

CASE NO. 90-09869 18

ABUNDANT LIFE CHRISTIAN CENTRE INC.,
Plaintiff ,

-vs-

WILLIAM MARKHAM, as Broward County Property Appraiser,

Defendant.

RESPONSE TO PLAINTIFF'S INTERROGATORY #1 AND CERTIFICATE OF SERVICE THEREON

Pursuant to the Order of this Court dated June 21, 1990, Defendant MARKHAM responds as follows to Interrogatory #1 of Plaintiff's Interrogatories served April 26, 1990:

The date of the Property Appraiser's Second certification of the Tax Roll for Broward County for the tax year 1989 was January 31, 1990.

(signed) William Markham

(Attest and certificate of service omitted)

IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

CASE NO. 90-2582

WILLIAM MARKHAM, as Broward County Property Appraiser,

Petitioner,

-vs-

ABUNDANT LIFE CHRISTIAN CENTRE, INC. and W. HERBERT MORIARTY, Circuit Court Judge,

Respondents.

PETITION FOR WRIT OF PROHIBITION
DIRECTED TO THE CIRCUIT COURT
FOR THE SEVENTEENTH JUDICIAL CIRCUIT

Law Offices of
GAYLORD A. WOOD, JR.
304 S.W. 12th Street
Fort Lauderdale, Florida 33315
(305) 463-4040

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PREFACE

Respondent, Abundant Life Christian Centre, Inc., filed an action in the trial Court contesting the Property Appraiser's denial of exemption on a parcel of vacant land for the year 1989. Petitioner, William Markham, as Broward County Property Appraiser, asserts that the Circuit Court has lost its jurisdiction under Section 194.171, Florida Statutes. Mr. Markham contends that the Court exceeds its jurisdiction by refusing to dismiss the case for lack of jurisdiction and continuing the proceedings.

Respondent Abundant Life is the Plaintiff below and is the real party in interest. The petition is supported by the Appendix hereto. If this Court issues an order to show cause, a response should be required from the Plaintiff/property owner, Abundant Life Christian Centre, Inc.

JURISDICTION

William Markham, as Broward County Property Appraiser, seeks a writ of prohibition directed to the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, to prohibit the further exercise of jurisdiction by that court in the case of *Abundant Life Christian Centre, Inc. v. William Markham, as Broward County Property Appraiser*, 17th Circuit, Case No. 90-09869.

By order dated September 4, 1990, the Circuit Judge denied the Property Appraiser's Motion for Summary Judgment based on Lack of Jurisdiction. (A-1) In issuing that Order and thereby retaining the case in the trial Court, the Court exceeded its jurisdiction.

The purpose of prohibition is to permit a superior court to prevent an inferior court from exceeding its jurisidction. *School Board of Marion County v. Angel*, 404 So.2d 359 (Fla. 5th DCA 1981). Prohibition is a

confined writ designed to prevent a trial court from acting in excess of its lawful jurisdiction. *State ex rel. Rash v. Williams*, 302 So.2d 474 (Fla. 3rd DCA 1974); *State ex rel. Pope v. Joanos*, 278 So.2d 305 (Fla. 1st DCA 1973). It is the appropriate remedy to prevent a court from acting without jurisdiction. *Old Republic Insurance Co. v. Whitworth*, 442 So.2d 1078 (Fla. 3rd DCA 1983)

In the instant action, the trial Court has exceeded its jurisdiction by failing to dismiss Abundant Life's claim for relief on Mr. Markham's motion. Abundant Life filed suit on March 30, 1990 to contest Mr. Markham's denial of religious exemption on the property. It asserted, *inter alia*, that the Property Appraiser's denial of exemption on the property was contrary to the provisions of Article VII, Section 3(a), of the Florida Constitution and Section 196.192(1), Florida Statutes. It also alleged that its action was filed pursuant to

Section 194.171(2), Florida Statutes, i.e., within 60 days of the certification of the tax roll by the Property Appraiser. At hearing on the motion, the Property Appraiser presented evidence of, and the Court took judicial notice of, the fact that the tax roll was certified on October 17, 1989, more than 3 months prior to the time the action was filed. (A-2) The fact of that certification was published in a newspaper of general circulation pursuant to Section 193.122, Florida Statutes. (A-3) The Property Appraiser also presented the Affidavit of Larry Nightingale, Clerk to the Property Appraisal Adjustment Board, attesting to the fact that the taxpayer did not file a petition to the Property Appraisal Adjustment Board, the administrative body created by Chapter 194, Part I, Florida Statutes (1986) to hear claims for relief in ad valorem tax cases, prior to instituting its action in the Circuit Court, nor was its

cause ever heard by that Board. (A-4-5)

The Property Appraiser's Motion for Summary Judgment based on lack of subject matter jurisdiction was heard on August 30, 1990. Abundant Life attempted to defend on the Motion by presenting the Affidavit of E. Scott Golden, alleging reliance on its attorney's communication regarding the exemption with attorney for the Property Appraiser and asserting that the action was timely filed. (A-6-8) It also argued that the entire tax roll was recertified on January 31, 1990, and that this action was filed within 60 days of that certification. That Affidavit also stated that the taxpayer's representative contacted the Property Appraiser's office in December, 1989, (A-6), while it was first notified of the denial of exemption at least six months earlier on June 1, 1989. (A-9) Abundant Life indicated that the Affiant was never informed by Mr. Markham's attorney of the date on

which its time to file an action in the Circuit Court began to run. The Property Appraiser asserted that the taxpayer received proper notice of the certification of the tax roll, the action which begins the time in which to file pursuant to Section 193.122(2), Florida Statutes, as does any other taxpayer in the County. The Trial Court denied the Property Appraiser's Motion for Summary Judgment.

The question presented by this petition for writ of prohibition is:

> WHETHER THE TRIAL COURT ERRED IN DENYING THE MOTION FOR SUMMARY JUDGMENT BASED ON LACK OF SUBJECT MATTER JURSIDICTION AND IN CONTINUING TO EXERCISE JURISDICTION OVER THE SUBJECT MATTER WHERE THE PLAINTIFF FAILED TO COMPLY WITH THE MANDATORY JURISDICTIONAL REQUIREMENTS OF SECTION 194.171(2) and (6), FLORIDA STATUTES, (1987).

An action to set aside a tax assessment is unknown at the common law. It is a purely statutory proceeding governed by Chapter 194

Part II, Florida Statutes (1987). The relevant statute is Section 194.171, Florida Statutes (1987), which states:

194.171 Circuit Court to have original jurisdiction in tax cases. --

(1) The circuit courts have original jurisdiction at law of all matters relating to property taxation. Venue is in the county where the property is located.

(2) No action shall be brought to contest a tax assessment after 60 days from the date the assessment being contested is certified for collection under s. 193.122(2), or after 60 days from the date a decision is rendered concerning such assessment by the property appraisal adjustment board if a petition contesting the assessment had not received final action by the property appraisal adjustment board prior to extension of the roll under s. 197.323.

(3) Before a taxpayer may bring an action to contest a tax assessment, he shall pay to the collector not less than the amount of the tax which he admits in good faith to be owing. The collector shall issue a receipt for the payment, and the taxpayer shall file the receipt with his complaint.

(4) Payment of a tax shall not be deemed an admission that the tax was due and shall not prejudice the right of a taxpayer to bring a timely action as provided in subsection (2) to challenge such tax and seek a refund.

(5) No action to contest a tax assessment may be maintained, and any such action shall

be dismissed, unless all taxes on the property assessed in years after the action is brought, which the taxpayer in good faith admits to be owing, are paid before they become delinquent.

(6) The requirements of subsections (2), (3) and (5) are jurisdictional. No court shall have jurisdiction in such cases until after the requirements of both subsections (2) and (3) have been met. A court shall lose jurisdiction of a case when the taxpayer has failed to comply with the requirements of subsection (5).

Section 194.171, Florida Statutes, is a jurisdictional statute of nonclaim rather than a statute of limitations. *Markham v. Neptune Hollywood Beach Club*, 527 So.2d 814 (Fla. 1988). The instant case relates specifically to subsections (2) and (6). The taxpayer failed to file its action in the Circuit Court within 60 days of the certification of the tax roll pursuant to Section 193.122(2), Florida Statutes. Since the taxpayer filed no petition before the property appraisal adjustment board regarding his 1989 taxes, no decision was rendered by that Board. Therefore, the second portion of

subsection (2) concerning the date on which the Property Appraisal Adjustment Board rendered a decision regarding a petition to it is irrelevant.

The construction of subsection (2) as to the court's discretion is not an open issue. Effective July 1, 1983, subsection (6) was added to the statute, expressly making the requirement of subsection (2), (3), and (5) jurisdictional. In spite of the clear langauge of the statute, the trial court herein denied the Defendant's motion for Summary Judgment. In so doing, the trial judge exceeded his jurisdiction and should be prohibited from continuing with the case.

The relevant case law since the addition of subsection (6) to the statute is unanimous and unequivocal. Numerous cases at all appellate levels have upheld the legislature's intention that the trial court lose jurisdiction of a tax case where the taxpayer does not comply with each

requirement of the statute.

Markham v. Neptune Hollywood Beach Club, *supra* dealt with the very same issue as the instant one -- a Plaintiff's failure to comply with the 60-day filing requirement of subsection (2). In that case, the Supreme Court made a clear distinction between the old law, Section 194.21, Florida Statutes, which lacked the language of subsection (6), and the new statute. The case clearly states that case law under the old statute which treats subsections (2), (3) and (5) as statutes of limitations are no longer applicable. The Court stated:

As the Department points out, in *Lake Worth Towers* we referred to Section 192.21(2), Florida Statutes (1967) , the predecessor to section 184.171(2), as a statute of limitations. Then in *Coe v. ITT Community Development Corp.*, we recharacterized section 194.171(2) as a non claim statute and noted that our use of the term "Statute of Limitations" in *Lake Worth Towers* was the result of "an inartful use of the term." Finally in *Miller v. Nolte*, we expressly receded from our characterization of the statute as a nonclaim statute in *Coe* and held that "[d]ue process requires that section

194.171(2) be considered a statute of limitations." However, as pointed out by the *Gulfside* court, although *Miller* was released subsequent to July 1, 1983, the effective date of section 194.171(6), in *Miller* we were addressing a pre-1983 tax assessment and did not address the clear expression of legislative intent contained in subsection (6) that subsection (2) be considered a jurisdictional statute of nonclaim. By application of subsection (6), the trial court in the instant case lacked jurisdiction to consider the taxpayers' suit. Therefore the suit was properly dismissed. (citations omitted)

Id. at 815-816

The Court added a peripheral footnote which helps to clarify the legislative intent in enacting Section 194.171(6) as well as to point up the fact that actions of the property appraiser cannot constitute a basis for waiver or estoppel as to the effect of the statute. In footnote 6 the Court notes that Chapter 83-204, section 7, Laws of Florida, which enacted the new provision, was the legislature's response to and curative of *Cape Cave Corp. v. Lowe*, 411 So.2d 887, a 1982 decision out of the Second District

which held that Subsection 194.171(2) was a statute of limitations. The effect of the legislature's enactment of subsection (6) was to make subsections (2), (3) and (5) unequivocably jurisdictional statutes of nonclaim which the property appraiser cannot be estopped from claiming by his actions. An agreement of parties cannot confer jurisdiction on a court. *Id.* at 816 Therefore, the claim of the taxpayer herein that it was never notified of the running of the time to file in discussions with the Property Appraiser's representatives provides no basis for relief from the requirements of the statute.

The *Neptune* Court made its decision in accord with *Gulfside Interval Vacations, Inc. v. Schultz*, 479 So.2d (Fla. 2nd DCA 1985), another case wherein the basis for dismissal of the action was the jurisdictional requirement of Section 194.171(2), Florida Statutes. In *Gulfside*, the Court

distinguishes prior decisions which referred to that section as a statute of limitations, making clear that the addition of subsection (6) to the statute makes it a jurisdictional statute of nonclaim:

> ...[W]e cannot escape the plain meaning of the legislature; the legislature obviously intended to make the sixty-day requirement in subsection (2) a jursidictional statute of nonclaim. Therefore, by the application of subsection (6), the trial court lacked jursidiction to consider the appellants' suit and the action of the trial judge in dismissing their complaint with prejudice was correct.

Id. at 778

Clark v. Cook, 481 So.2d 929 (Fla. 1th DCA 1986) arose from a petition for a writ of prohibition, as in the instant action. In that case, the tax collector sought the writ to prevent the trial court from maintaining jurisdiction over a case where the taxpayer had brought suit, but had not made a good faith payment for taxes within the 60-day period as required by the related section 194.171(3), Florida Statutes. The plaintiff

made tender of the tax required under the subsection after the period required by that section. The court stated that the issue is not complex, holding that when there is a late tender of taxes, the cause could not survive the jurisdictional requirement of subsection (6):

> [T]he late tender could not breathe life back into the action, even were we to construe the statute so as to permit tender of payment, and refusal of tender, to be the equivalent of actual payment for the purpose of deciding a motion to dismiss.

Id. at 931

This court also noted in *Clark* that the trial court might have relied on decisions made prior to the 1983 addition of subsection (6) to the statute. It stated that such reliance was error.

Markham v. Corlett, 453 So.2d 907 (Fla. 4th DCA 1984), in an opinion less than one-half page long, reversed a lower court order and held that pursuant to Subsections

194.171(5) and (6), an action contesting a tax assessment is barred because the taxes in question were not paid before they became delinquent. In that case, the taxpayer had made a "good faith payment", but tax certificates were sold for the year in question. There, in late compliance with the related subsection, the taxpayer redeemed the certificates and argued that this restored the lower court's jurisdiction. However, this Court held that the trial Court lost jurisdiction the moment the taxes for the year in question became delinquent.

In *Bystrom v. Diaz*, 514 So.2d 1072 (Fla. 1987), the Supreme Court reversed a decision of the District Court of Appeal, Third District, *Diaz v. Bystrom*, 487 So.2d 1112 (Fla. 3rd DCA 1986), which found that failure to pay a subsequent year's taxes was not fatal to the action. In *Bystrom*, the Supreme Court cogently observed:

Although subsections 194.171(5) and (6) appear to be somewhat harsh, their meaning is clear. Subsection 194.171(5) plainly states that a taxpayer may not maintain a suit contesting a tax assessment, and that such an action "shall be dismissed, unless all taxes on the property assessed in years after the action is brought, which the taxpayer in good faith admits to be owing, are paid before they become delinquent." Subsection (6) expressly declares that these requirements are jurisdictional and that "[a] court shall lose jurisdiction of a case when the taxpayer has failed to comply with the requirements of subsection (5)." The statute does not allow a court to retain jurisdiction once taxes become delinquent. (e.s.)

Bystrom v. Diaz, *op. cit.*, at 1075

The Court went on to state that this requirement is not an undue burden on the taxpayer, but is a reasonable restriction on his rights as prescribed by law. This requirement was not found to be unreasonable in that it necessitates only that the taxpayer, as a prerequisite to keeping his suit alive, pay the undisputed amount of a subsequent year's taxes due prior to delinquency. *Id.* Herein, the only requirement is that the taxpayer file its court action within 60 days of a public act

of which it receives notice pursuant to statute. Such a requirement is necessary in order for the various taxing bodies in the County to be able to establish the amount of dollars available to them.

Most recently, in *Markham v. Hinckley*, 544 So.2d 1130 (Fla. 4th DCA 1989), this Court once again granted a writ of prohibition requiring dismissal of an action which violated the provisions of Section 194.171(5). This Court cited *Clark v. Cook*, *supra* and *Bystrom v. Diaz*, *supra* in finding once again that "the jurisdictional requirements of Section 194.171 must be strictly enforced." *Id.* at 1140

There is no question here that the trial Court lost its jurisdiction. Abundant Life argues that the second certification of the tax roll following the institution of the procedures called for in Section 197.323 is the act which began the running of the time to file. That assertion is incorrect.

In most of the smaller counties, all Property Appraisal Adjustment Board Hearings are completed prior to the certification of the tax roll by the Property Appraiser, and the tax roll is certified only once, for all properties in the county. However, in a large county such as Broward, it is not feasible to hold all hearings of the PAAB and render all decisions on contested properties prior to November 1 of the tax year. In those circumstances, pursuant to Section 197.323, Florida Statutes, the tax collector may request of the County Commissioners that the tax roll be extended and certified prior to completion of PAAB hearings. That certification, made prior to November 1, begins the 60-day time period in which an action may be filed for all properties, such as that of the taxpayer herein, on which there has been no petition to the PAAB and those properties for which a PAAB decision has been rendered prior to the time of

certification. Section 197.323(1), Florida Statutes In order for the PAAB to continue hearings beyond November 1, the tax roll is once again extended and a second certification is made at the conclusion of all PAAB hearings. Section 193.122(1), and 197.323(1) Florida Statutes The second certification, however, has no effect on the running of time in which to file suit. When the provisions of Section 197.323 are fulfilled, those properties for which a decision has not been rendered prior to the first certification of the tax roll have 60 days from the time a decision is rendered by the Board in which to file an action. Section 194.171(2), Florida Statutes.

In the instant case, there was no petition to the Property Appraisal Adjustment Board, and hence, no hearing. Therefore, the only provision of Section 194.171(2) which applies is the first part. The taxpayer's assessment was a settled matter by the time

the tax roll was certified on October 17, and no notice of a Board decision was applicable to his case. In any event, nowhere in the law is the second certification of the tax roll identified as an event which starts the running of time to file a civil action.

The taxpayer failed to follow the provisions of the statute. Abundant Life was privy to the information available to all taxpayers pursuant to Section 193.122, requiring that the Property Appraiser publish and supply notice of the certification date. There was no question as to whether the exemption had been denied, in that a Notification of Assessment and Taxes (TRIM Notice) was sent pursuant to Section 194.011, Florida Statutes, advising the taxpayer of the taxes due as well as a notice of denial of the application for exemption, informing each taxpayer whose application was denied of the right to a hearing before the Property Appraisal Adjustment Board. (A-9) Due

process was satisfied pursuant to statute, and the taxpayer was presumed to know the law. The foreseeable but unfortunate result is that the trial court now lacks jurisdiction to allow this action to continue. The property appraiser had a clear duty to follow the statute in moving to have the case dismissed. The trial court, in denying the Property Appraiser's motion, has now exceeded its jurisdiction.

CONCLUSION

The trial court's order of September 4, 1990 should be vacated and the trial court instructed to grant the motion for summary judgment based on lack of jurisdiction over the subject matter.

Respectfully submitted,

Law Offices Of
CAYLORD A. WOOD, JR.

By: _____
B. Jordan Stuart

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Prohibition and Appendix was served by mail this _____ day of September, 1990, on E. SCOTT GOLDEN, ESQ., and LAW OFFICES OF PERRY W. HODGES, JR., Attorneys for Plaintiff, 644 S.E. 4th. Avenue, Fort Lauderdale, Florida 33301, AND HON. W. HERBERT MORIARTY, Circuit Judge, Broward County Courthouse, Room 801, Fort Lauderdale, Florida 33301.

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By: _____
Attorney for Defendant MARKHAM

§ 86.091, F.S., provides: "...If the statute, charter, ordinance or franchise is alleged to be unconstitutional, the Attorney General or the state attorney of the judicial circuit in which the action is pending shall be served with a copy of the complaint and be entitled to be heard.

§ 194.011(1), F.S., provides: (1) Each taxpayer whose property is subject to real or tangible personal ad valorem taxes shall be notified of the assessment of each taxable item of such property, as provided in s.200.069.

§ 200.069, F.S., provides: (8) Pursuant to s.200.065(2)(b), the property appraiser, in the name of the taxing authorities within his jurisdiction and at

the expense of the county, shall prepare and deliver by first-class mail to each taxpayer to be listed on the current year's assessment roll a notice of proposed property taxes, which notice shall be in substantially the following form. ...(8) The notice shall further read: Your property value as of January 1: Assessed value $____ Exemptions $_____, Taxable Value $_____ Last year's assessed value: $ (amount) . If you feel that the assessed value of your property is inaccurate or does not reflect fair market value, contact your county property appraiser at (phone number) or (location) . If the property appraiser's office is unable to resolve the matter as to market value, you may file a petition for adjustment with the Property Appraisal Adjustment Board. Petition forms are available from the

county property appraiser and must be filed ON OR BEFORE __(date)__.

§ 194.011(3)(d), F.S., provides: The petition may be filed, as to valuation issues, at any time during the taxable year on or before the 25th day following the mailing of notice by the property appraiser as provided in subsection (1). With respect to an issue involving the denial of an exemption, an agricultural classification application, or a deferral, the petition shall be filed at any time during the taxable year on or before the 30th day following the mailing of the notice by the property appraiser under ...s. 196.193...

§ 194.015, F.S., provides: There is hereby created a property appraisal adjustment board for each county, which

shall consist of three members of the governing body of the county as elected from the membership of the board of said governing body, one of whom shall act as chairman, and two members of the school board as elected from the membership of the school board...

§ 194.034, F.S. provides: (1)(a) Petitioners before the board may be represented by an attorney or agent and present testimony or other evidence. The property appraiser or his authorized representative may be represented by an attorney in defending his assessment or opposing an exemption and may present testimony or other evidence. The property appraiser, each petitioner, and all witnesses shall be required, upon the request of either party, to testify under oath as administered by the chairman of

the board. Hearings shall be conducted in the manner prescribed by rules of the department, which rules shall include the right of cross-examination of any witness. ...(2) The decision of the board shall contain findings of fact and conclusions of law and shall include reasons for upholding or overturning the determination of the property appraiser. When a special master has been appointed, the recommendations of the special master shall be considered by the board. The clerk, upon issuance of the decisions, shall, on a form provided by the Department of Revenue, notify by first-class mail each taxpayer, the property appraiser, and the department of the decision of the board.

§ 196.011(1), F.S. provides: Every person or organization who has the legal title to

real or personal property, except inventory, which is entitled by law to exemption from taxation as a result of its ownership and use shall, before March 1 of each year, file an application for exemption with the county property appraiser, listing and describing the property for which exemption is claimed and certifying its ownership and use...

§ 196.193(5), F.S. provides: In the event the property appraiser shall determine that any property claimed as wholly or partially exempt under this section is not entitled to any exemption or is entitled to an exemption to an extent other than that requested in the application, he shall notify the person or organization filing the application on such property of that determination in writing on or before July 1 of the year for which the

application was filed. All notifications must specify the right to appeal to the property appraisal adjustment board and the procedures to follow in obtaining such an appeal. Thereafter, the person or organization filing such application, or a duly designated representative, may appeal that determination by the property appraiser to the board at the time of its regular hearing. ...

§ 197.322(3), F.S., provides: Within 20 working days after receipt of the certified ad valorem tax roll and the non-ad valorem assessment rolls, the tax collector shall mail to each taxpayer appearing on said rolls, whose post-office address is known to him, a tax notice stating the amount of current taxes due from the taxpayer and if applicable, the fact that back taxes remain unpaid and

advising the taxpayer of the discounts allowed for early payment. Pursuant to s. 197.3632 the form of the notice of non-ad valorem taxes and the notice of ad valorem taxes shall be as provided in s. 197.3635 and no other form shall be used, notwithstanding the provisions of s.195.022. ...